Exceptions Permitting Closed Session – Legal Advice, §10-508(a)(7) – Outside exception – Request to counsel to draft legislation

Exceptions Permitting Closed Session – Litigation, §10-508(a)(8) – Status of pending litigation – Outside exception – Request to counsel to draft legislation

Exceptions Permitting Closed Session – Business Relocation, §10-508(a)(4) – Discussion of proposed zoning change, outside exception

Exceptions Permitting Closed Session – Business Relocation, §10-508(a)(4) – Discussion of financial incentives for that specific business entity, inside exception

Exceptions Permitting Closed Session – Business Relocation, §10-508(a)(4) – Discussion of legislation, outside exception

Closed Session Procedures – General – Practices permitted – Vote at same meeting, shortly before closed session

Minutes – Contents – Practices in violation – Failure to include in open session minutes actions that were taken in closed session but should have been taken in open session

April 25, 2011

Complainant:
Craig O'Donnell

Respondent:
Kent County Commissioners

The Open Meetings Compliance Board has consolidated and considered the three complaints of Craig O'Donnell ("Complainant") of the Kent County News that the Board of County Commissioners of Kent County("Commissioners") violated the Open Meetings Act with respect to meetings in 2009 and 2010. Some allegations were resolved in an informal conference our counsel held with the Complainant, the County Administrator, and the County's Economic and Tourism Development Director. *See* §10-

502.5(e) of the State Government Article ("SG"). We now address the remaining issues, which we summarize as follows:

(1) Did the discussion during a closed session on November 17, 2009 concerning pending litigation exceed the basis for closing the meeting?

(2) Did the Commissioners exceed the scope of the exception they claimed for closing various sessions to discuss selling County land to the Fairweather Team, Inc., a solar utility company which proposed to locate in the County?

(3) Did the Commissioners exceed the scope of the exception they claimed for closing various sessions to discuss the proposal of the company known as "Firefly" to locate in the County?

(4) Did the Commissioners violate the Act when they reconvened a closed session which they had temporarily recessed earlier the same day without voting again on whether to convene in closed session?

I

The "Drayton Manor" Issue

The Commissioners held a closed session on November 17, 2009, to hear from the County Attorney concerning ongoing litigation. To do so, they invoked the exceptions relating to legal advice and litigation to close the meeting. As crystallized at the informal conference, Complainant's argument is that subsequent events demonstrate that the discussion exceeded the scope of either exception.

A. Background

1. Drayton Manor Litigation

In 1999, Kent County adopted a Growth Allocation Policy that governs development decisions in parts of the County in the Chesapeake Bay Critical Area. In 2003, a developer filed an application to reclassify a site known as the Drayton Manor property in order to develop a resort and conference center at that site. In 2007, the Commissioners granted a growth allocation to the developer pursuant to the Growth Allocation Policy. The decision was then

forwarded to the Critical Areas Commission for its review as required under State law. The Critical Areas Commission approved the Commissioners' decision.

Opponents of the development filed actions challenging the approvals in the circuit courts for Kent County and Anne Arundel County. The County prevailed in the Kent County action and the Court of Special Appeals dismissed an appeal of that decision. At the time of the November 17, 2009 meeting, the opponents were seeking a writ of certiorari in the Court of Appeals.[1] The issue on which the opponents sought further review was a procedural question concerning the appropriate time for appealing a growth allocation decision by the Commissioners – *i.e.*, whether the Commissioners' decision itself or the subsequent Critical Areas Commission approval triggered the appeal period under the Growth Allocation Policy. Subsequent to the meeting, the Court of Appeals granted certiorari and heard arguments; it currently has the case under advisement.

2. Closed Session

According to the response to the complaint, the meeting notice for the November 17, 2009, meeting indicated that part of the meeting would be closed for the Commissioners to discuss the Drayton Manor litigation with the County Attorney. The closing statement for that session similarly referenced that litigation, cited the Act's exceptions for legal advice and discussion of litigation, and stated that the meeting was closed to protect the "confidentiality of information covered by attorney-client privilege." The open minutes adopted at the next meeting of the Commissioners summarized the actions taken during the closed session as follows:

> In closed session, the Commissioners requested that [the County Attorney] prepare an amendment for the Growth Allocation Policy for their consideration and the Commissioners decided not to file a response to the Petition of Certiorari that is pending in the Court of Appeals as it relates to the Drayton Manor growth allocation case.

We have reviewed the minutes of the closed session submitted by the County. Without revealing the precise substance of those minutes, we can confirm that they are consistent with the closing statement and open minutes – that is, the County Attorney provided a report on the status of the litigation, the County

[1] The Anne Arundel County case was subsequently transferred to the Circuit Court for Kent County, where it was dismissed.

Attorney offered legal advice as to steps the Commissioners could take in relation to that litigation, and the Commissioners in response made the decisions reported in the open minutes.[2]

As indicated in the minutes, one of the decisions made by the Commissioners in the closed session was to ask the County Attorney to draft an amendment to the County's Growth Allocation Policy. The County Attorney prepared an amendment, which the Commissioners subsequently adopted at their December 1, 2009, meeting. According to the response, the purpose of the amendment was described at the December 1 meeting during the public session. As stated by the County Attorney and reflected in the resolution itself, the amendment was "for clarification purposes only" and was intended to be consistent with the construction of the appeal provision that had been adopted by the Court of Special Appeals in dismissing the Drayton Manor case. Apparently, there was a hope that the amendment might render moot any further consideration of the case by the Court of Appeals.[3]

B. Analysis

1. Contentions

The Complainant does not dispute that the open minutes recite the actions taken by the Commissioners in closed session. Rather, he complains that the actions taken by the Commissioners in the closed session – in particular, the decision to consider an amendment of the Growth Allocation Policy – were not publicly known until the meeting at which the Commissioners adopted the amendment. Because of the intervening Thanksgiving holiday, the open minutes were not publicly available for the two weeks following the November 17, 2009, meeting during which Complainant assumed that the closed session had involved only an update on the status of the litigation. Moreover, the Complainant believes that any discussion of the Growth Allocation Policy or its amendment should have taken place in open session.

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[2] The initial version of the open minutes incorrectly identified the court in which the petition for certiorari was pending – an error that was later corrected in both the closed and open minutes.

[3] Given that the Court of Appeals accepted the case and presumably will decide whether the opponents filed a timely appeal, the question whether the amendment clarified or changed the Policy's appeal procedure may ultimately depend on the decision of that Court.

The County Attorney argues that the Commissioners meticulously followed the Act's procedures in closing the session, that the discussion was squarely within the exceptions for legal advice and consultation about litigation, and that the amendment of the Growth Allocation Policy involved procedure, not the substance of the policy, and, in any event, did not effect any change in public policy.

2. Discussion

The consideration, adoption, or amendment of a policy such as the Growth Allocation Policy is, in the taxonomy of the Open Meetings Act, a "legislative function." §10-502(f)(1) ("approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy"). When a public body is engaged in a legislative function, it must ordinarily meet in open session. §10-505. This requirement covers "every step" of the legislative process. *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980). There are several exceptions to this requirement, including those for consultations with counsel to receive legal advice (§10-508(a)(7)) and for consultations with staff and other individuals about pending or potential litigation (§10-508(a)(8)). The exceptions are to be strictly construed. §10-508(c).

The legal advice and litigation exceptions may be invoked when a public body wishes to receive confidential advice concerning the resolution of litigation, and they can even encompass execution of a settlement agreement or consent decree. 7 *OMCB Opinions* 36 (2010). In some cases, the policy discussion may be so interrelated with litigation strategy that discussion of those considerations may legitimately occur in closed session. But the litigation exception may not be used as a pretext for engaging in closed discussions concerning an underlying policy issue that, though related to the litigation, can reasonably discussed separately. *See* 1 *OMCB Opinions* 56, 60-61 (1994) (while city council could discuss in closed session possible ways to avert a lawsuit related to alleged zoning violation by a day care center, discussion of alternative locations for day care center should have occurred separately in open session).

The line is not always easy to draw. In a matter involving a proposed ordinance that was the subject of pending litigation, we concluded that a city council could discuss legislative findings critical to the defense of the ordinance in closed session. "That an option involves changes in the law does not negate the exception, so long as the subject of the discussion remains the litigation, rather than the policy issues in and of themselves, separate from the litigation." 3 *OMCB Opinions* 61, 65 (2000). But we also noted in that case

that the policy debate concerning the legislative findings occurred in the open session that immediately followed the closed session. *Id*.

We find little to quibble with in the procedures the Commissioners followed or the documentation they created in connection with the November 17, 2009 meeting. The prospective closure of the meeting was announced in advance of the meeting, the closing statement accurately described the reasons for closing the meeting and cited the appropriate legal authority, and the discussion reported in the closed minutes was almost entirely within the two exceptions cited in the closing statement. It was certainly within the scope of those exceptions for the Commissioners to hear about the litigation, hear their attorney's advice, and ask any questions they had about the implications of that advice.

We take issue with just one aspect of the closed session. The Commissioners' decision to direct the County Attorney to draft an amendment to the Growth Allocation, though it may have resulted from the County Attorney's advice, was not itself a request for legal advice covered by the attorney-client privilege. While this legislative action was perhaps inspired by the Drayton Manor litigation, it was not directly part of that litigation. Rather, it was an amendment of a plan the County is required to maintain by State law. Thus, at the very least, that decision should have been announced when the Commissioners returned to their open session.

The Compliance Board considered an analogous situation in 1 *OMCB Opinions* 145 (1995). There, a city council held a series of closed sessions to receive legal advice concerning the First Amendment implications of an ordinance governing solicitation and peddling. While the Compliance Board accepted the city attorney's representation that the meetings did not involve any discussion by council members concerning the merits of such a policy, nevertheless we concluded that the council's direction to the city attorney to draft an ordinance should have occurred in open session. "This decision was a key component of the legislative process ...." *Id.* at 150. This legislative process would have a broader effect than the resolution of particular litigation. *Compare* 1 *OMCB Opinions* 201 (1997) (board of zoning appeals could have properly closed session concerning its implementation of circuit court decision reversing its prior decision).

It is true that the amendment did not affect the substantive aspects of the Growth Allocation Policy, but rather concerned the procedures by which a person may challenge decisions made under the substantive policy. However, that does not mean that the creation, alteration, or clarification of appeals rules is not itself a matter of public policy. The Open Meetings Act itself contemplates that the creation of procedural rules may come within the Act.

See §10-502(h)(3)(vi) (excluding courts from the definition of "public body" except when the court is exercising rulemaking power). The Court of Appeals and its Rules Committee both consider changes in procedural rules in open sessions.

By contrast, the Commissioners' decision not to file a response to the petition for certiorari need not have occurred in open session. The decision whether or not to file a responsive pleading in litigation will generally not involve the formulation of policy. In 4 *OMCB Opinions* 67, 72 (2004), we held that a county council's decision in closed session to agree to dismiss a lawsuit challenging its prior actions did not violate the Act, as it fell within the administrative function exclusion. However, "[h]ad the Council engaged in any negotiations that would have required it to revisit its prior policy decisions, or otherwise engaged in any stage of policy formation, the Council's action would not have fallen within the scope of the [administrative] function exclusion." *Id.*

C. Summary

The Commissioners provided advance notice of their closed session on November 17, 2009, followed the appropriate procedures for closing part of their meeting, and adequately documented the closed session. The discussion during the closed session was almost entirely within the claimed exceptions from the open meetings requirement. However, the Commissioners' direction to the County Attorney to prepare an amendment to a procedural provision of the Growth Allocation Policy should have been part of the open session.

II

The "Fairweather" Issue

A. Facts and Contentions

Complainant alleges that the Commissioners violated the Act by discussing in closed meetings matters which did not fall within the exception they cited in their closing statements. Specifically, Complainant alleges that the Commissioners violated the Act by "negotiating and approving a contract [and] discussing zoning... and legislation" in four sessions they had closed under SG §10-508(a)(4), which permits closed-session consideration of matters concerning a business's proposal to "locate, expand, or remain in the State...." The business in question was Fairweather Team, Inc., ("Fairweather"), which proposed to buy County land and operate a solar utility there. The Commissioners respond that while they received information about Fairweather's request for a zoning text amendment in closed session, they did

not discuss the proposed legislation in closed session, and that, in any event, the County's Renewable Energy Task Force had already been created to study such legislation.

These contentions require us to review the history of the Commissioners' passage of a text amendment to the County Land Use Ordinance. The Commissioners have provided us with their minutes and those of two other entities, the County's Renewable Energy Task Force ("Task Force") and Planning Commission. Neither entity is a party to this matter.

On May 21, 2010, the Task Force met for the first time to consider solar energy uses in the County.[4] According to its meeting summaries, the Task Force agreed that "Utility scale solar should be permitted with standards (special exception)" and that "Staff [are] to provide special exception language for utility scale solar power in the Industrial District." The Task Force recommendation thus was that utility scale solar uses be allowed by special exception, rather than as of right in the 1,100-acre Industrial District.

Four days later, on May 25, 2010, the Commissioners met in an open meeting and then, at 8:37 a.m., voted "[t]o go into closed session to consider a preliminary matter that concerns the proposal for a business or industrial organization to locate, expand or remain in the State in accordance with [§] 10.508(a)(4) [of the Act]." The closing statement also cites that provision ("the business location exception"). Under "Reason for Closing," the closing statement states, "Confidentiality of business proprietary information and negotiations concerning property"; under "Topics to be discussed," it states, "Business' proposal to locate in Worton Industrial Park." The open minutes identify the non-Commissioner attendees; they included Mr. Hoon, who is a private lawyer, and his client, Mr. Fairweather, as well as a realtor, the County Attorney, and four County employees, including the County's Director of Planning. The minutes further state: "Topics of discussion related to a business proposal to locate in the Worton Industrial Park." The minutes also report various "Planning" topics discussed in the open meeting; none involved proposed uses in the Industrial District.

At 9:10 a.m., the Commissioners "temporarily adjourned" their closed meeting "to reconvene later in the morning," and they did so at 10:47. The minutes of the open session additionally report:

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[4] We have received no allegations that the Task Force violated the Act, and we do not know whether it was a public body. In any event, it appears that at least some of the Task Force meetings were open to the public.

> In closed session, the Commissioners approved for [the County Attorney] to move forward to negotiate modifications to the proposed purchase options agreement as presented by Mr. Fairchild [sic] regarding his proposed purchase of one or more lots located in the Worton Industrial Park.

The Commissioners have provided the closed minutes to us, and we shall describe them only to the extent that the County has divulged their contents in its response. The many topics discussed during the closed session included the need for a zoning text amendment to allow Mr. Fairweather's proposed use of the property for a solar-energy utility, the timing of such an amendment, and a report by the Director of Planning on the Task Force's plans to address amendments to the Land Use Ordinance. The minutes do not reflect that any Commissioner spoke on these topics.

On June 4, 2010, the Task Force met and agreed on the following "Action item": "Solar energy systems should be permitted in the Industrial District....Staff to provide draft permitted use language for utility scale solar power in the Industrial District." The meeting summary does not reflect discussion on why the Task Force changed its recommendation from allowing the use by special exception to permitting it as of right.

On June 15, 2010, the Commissioners again voted to close a portion of their regular meeting to discuss "the proposal for a business to locate in Kent County." The presiding officer indicated on the closing statement that the topic to be discussed was "Proposal by business to locate in Worton Industrial Park," and that the reason for closing was "Confidentiality of business' proprietary information and protection of purchase price negotiations." The summary of the closed session contained in the open minutes states that the Commissioners "approved for [the Town Attorney] to move forward with negotiating contract submitted for the purchase of lots located in the Worton Industrial Park." The closed minutes reflect the County Attorney's discussion of a revised contract and various requests by the business, including an August deadline for passage of "the Zoning Text Amendment." The County Attorney reported that the Director of Planning had commented that a November deadline was more feasible. The open meeting minutes do not disclose that discussion of the zoning text amendment, and it apparently was not discussed during the open discussion of planning issues.

On June 18, 2010, the Task Force met and agreed on "language for solar energy systems in the Industrial District."

On June 22, 2010, the Commissioners met for a third time in closed session to discuss the Fairweather proposal. The closing statement cited the same exception, reasons, and topics as those listed on the June 15 closing statement. The proposed zoning text amendment was not discussed in either the open or the closed meeting. The minutes of both sessions reflect the Commissioners' authorization to the County Attorney "to continue to negotiate an agreement for the purchase of lots located in the Worton Industrial Park."

On July 1, the Kent County Planning Commission met to address various items, including the Task Force's recommendation that the Land Use Ordinance be amended to permit utility-scale solar and small-scale accessory solar uses in the Industrial and Employment Districts. Mr. Hoon testified that he had a client who wished to put a solar manufacturing plant in Kent County, and Mr. Fairweather testified that he "was very interested in solar energy " and "want[ed] to build a large scale manufacturing plant." The Commission voted to recommend the Task Force's language on utility-scale solar uses.

On July 8, 2010, the Commissioners published a notice of a public hearing, to be held on July 27, 2010, regarding Code Home Rule Bill # 2-2010, "which is an act to amend Article V, Sections 14.2 (Employment Center - Permitted Uses and Structures), 15.2 (Industrial - Permitted Uses and Structures) and Article XI, Section 2 (Definitions) of the Kent County Land Use Ordinance to add new provisions for utility scale solar energy systems."

On July 20, 2010, a week before its public hearing on Bill #2-2010, the Board met in its fourth closed session to discuss the Fairweather proposal. The Board again cited the "confidentiality of business' proprietary information." The closed minutes state that the Commissioners signed a contract with Fairweather in the closed session. The open minutes state that the Commissioners "resolved questions concerning State grant funding[,] imposed conditions on the sale of lots in Worton Industrial Park, and reached an agreement with Fairweather Team, Inc. for the sale of Lot 2 and purchase options for Lots 3 and 4."

The contract the Commissioners signed on July 20 specifies this "Condition Precedent":

> B. *The "Zoning Requirement*:"
>
> (i) There is some uncertainty about whether Buyer's Intended Use is authorized by the Kent County Land Use Ordinance ... as a permitted use in the LI-Light Industrial zoning district in which the Business Park is located;

> (ii) As soon as possible after the date hereof, Seller will introduce a zoning text amendment to clarify and assure that uses like Buyer's Intended Use are permitted in the Business Park and other properties in the LI-Light Industrial District ("**the Zoning Text Amendment**"). In the event that the Zoning Text Amendment is not enacted by November 15, 2010, (the "**the Zoning Text Amendment Contingency Date"**), the Deposit shall be returned to Buyer and this Agreement shall be null and void thereafter.

At 9:30 a.m. on July 27, 2010, the Commissioners conducted a public hearing on Bill # 2-2010. The minutes of that public hearing contain the text of the bill, which added "Solar Energy Systems, Utility Scale" to the "Employment Center Permitted Uses" and "Industrial Permitted Uses" sections of the Land Use Ordinance. The Planning Commission's recommendation that the bill be approved was introduced. The County's Director of Planning also addressed the amendment. She stated that it was the "first in a series of potential amendments concerning alternative energy sources." According to the minutes, the contract with Fairweather was not mentioned.

The Commissioners also held a regular meeting on July 27, 2010.[5] The minutes state:

> Commissioner Crow advised that the County reached an agreement and entered into a contract on July 20 with Fairweather Team, Inc. for the sale of Lot 2 of the Worton Industrial Park and purchase options on Lots 3 and 4. Fairweather Team, Inc. plans to place a solar energy manufacturing facility on the properties. Commissioner Crow advised that the agreement signed with Fairweather Team, Inc. is conditioned on use of the property for a solar energy facility, and the property cannot be sold and used for other purposes without the Commissioners' approval.

The Commissioners made the July 20 contract available to the public on July 27.

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[5] It is not clear from the minutes of the regular meeting whether the public hearing preceded that meeting.

On August 3, 2010, the Commissioners' business included a "Code Home Rule Zoning Text Amendment," as follows:

> Third reading was held today on Code Home Rule Bill Number 2-2010, which is *An Act to amend Article V, Sections 14.2 (Employment Center - Permitted Uses and Structures), 15.2 (Industrial - Permitted Uses and Structures) and Article XI, Section 2 (Definitions) of the Kent County Land Use Ordinance to add new provisions for utility scale solar energy systems.*
>
> Ballots were distributed to Commissioner Fithian and Commissioner Pickrum for voting. Commissioner Crow was absent. Upon their return, both ballots were marked favorable and the bill was adopted and signed by the Board. The effective date of this bill will be September 17, 2010.

The minutes of the August 3 meeting do not reflect deliberations on the zoning text amendment.

B. Discussion

The "business location" exception permits a public entity to close a meeting to "consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State...." §10-508(a)(4) of the State Government ("SG") Article. We have applied it six times. Each of those opinions is instructive on whether the discussion of a text amendment in a closed session exceeds the scope of the exception.

In the first opinion, 1 *OMCB Opinions* 28, 29 (1993), we considered allegations that a board of town commissioners improperly invoked the exception to discuss a proposal that would require an amendment of an annexation agreement between the town and the seller of the affected property. We found that the discussion was properly limited to a discussion of the proposal. *Id*. at 29. We further noted that "the materials supplied by the board reflect an understanding by the board that the exception would not be properly invoked when the matter involved not a discussion of the proposal ... but rather consideration of a possible amendment to an annexation resolution." *Id.* We also described the evolution and purpose of the exception:

> The exception ...reflects a rare instance in which the 1991 amendments [to the Act] broadened the scope of an exception that had been in the original Act. Under its former wording, §10-508(a)(4) authorized a public body to meet in closed session to "consider a preliminary matter that concerns the proposal for a business or industrial organization in the State." In 1991 the Legislature deleted the modifier "preliminary" and authorized the exception not only for proposals by a business or industrial organization [to] locate in the State but also to "expand" or to "remain" in the State.
>
> This wording evidently reflects the Legislature's understanding that some businesses might be deterred from making proposals about relocation, expansion, or retention of an existing facility if all such discussions were open to public view.

Id.

In 2 *OMCB Opinions* 56 (1999), we applied the SG §10-508 (c) mandate that the exceptions be "strictly construed in favor of open meetings of public bodies," and we construed the "business location" exception not to include proposals by other public bodies. In 2 *OMCB Opinions* 80 (1999), where the public body had not invoked the exception, we applied it hypothetically: "[I]f the overall discussion concerned a business' possible relocation to a site in Hyattsville under circumstances in which the business insisted on the need for confidentiality, §10-508(a)(4) authorized discussion in closed session." *Id.* at 82.

We then began to extend the exception to certain matters collateral to a business location proposal. In 2006, in a matter involving the same Complainant and public body as in this matter, we addressed allegations involving a business proposal to relocate in the Worton Industrial Park. 5 *OMCB Opinions* 72 (2006). There, Complainant asserted that the exception did not apply to discussions about the sale of County land. The Commissioners responded that the County had sub-divided the industrial park into lots in order to sell them to businesses seeking to relocate and that any relocation proposal necessarily involved discussions about the purchase of the lots. *Id.* at 74. After reviewing the closed-session minutes, we agreed with the Commissioners and explained that various topics of such a discussion could fall within the scope of the exception:

> A closed-session discussion is permitted about a business proposal "to locate, expand, or remain in the State." Such a proposal could involve a host of considerations, including the sale or other transfer of government land. Obviously, businesses that are considering relocation or expansion will be concerned about the site, including acquisition costs. From the perspective of a public body, the land that it owns might be an important bargaining chip. Economic development deals of the kind described in §10-508(a)(4) generally involve a subsidy to attract the business investment that, in the long run, is thought to justify the subsidy. Subsidies can be of various kinds, including the gift or below-market sale of land. This is particularly so when a county owns land that it is seeking to transform into a fully occupied industrial park. The characteristics of a business seeking to purchase land in an industrial park, the economic development benefits and potential negative consequences of selling to a particular private business, offering price – all of these are directly related to a public body's discussion of a proposal for a business to locate in a particular site.

Also in 2006, we addressed whether a Town Council would have exceeded the exception, had the Town Council claimed it, by discussing whether the Town's boat slip tax would apply to a business's proposed lease of the slips. We stated:

> Assuming that the business proposal involved use of the boat slips on the property, the potential application of a tax would be factored into any business decision; thus, we cannot say that such a discussion would be inappropriate in a meeting closed under §10-508(a)(4). On the other hand, had the discussion not been tied to a specific business proposal but instead focused on the tax as a policy matter, the discussion would have exceeded the limits of the exception....

5 *OMCB Opinions* 86,90 (2006) (footnote omitted).

Then, in 2009, a complainant alleged that the Kent County Commissioners improperly invoked the exception to conduct a closed meeting regarding a proposal to locate a rubblefill in the County. 6 *OMCB Opinions* 192 (2009). We reviewed the closed minutes, noted that they provided "significant detail in terms of the respective roles of the business and the

County," commented on our inability to disclose the details of the discussion, and concluded that the "discussion did not transcend the exception...." We explained:

> While the Act requires that the exception be construed narrowly, that does not mean that the County Commissioners could not address any collateral matters – matters that the Commissioners would be expected to address in evaluating a business proposal. While the scope of discussions was indeed broad, it is unrealistic to expect that the matters discussed could have been practically separated and discussed outside of the context of the specific business proposal.

Id. at 194.

In none of these opinions did we state that the business location exception could shield decisions and deliberations on pending legislation from public view. Nonetheless, in retrospect, we fear we worded our 2009 advice to the Commissioners so broadly as to suggest that we are now reading the exception more expansively than we did in 1993. *See* 1 *OMCB Opinions* 29 (implicitly approving the public body's understanding that amending an annexation resolution, even where allegedly integral to the proposal under discussion, was a matter for open session). Specifically, the Commissioners may have taken our application of the exception to "collateral matters... that the Commissioners would be expected to address in evaluating a business proposal" to allow substantial closed-meeting deliberations on legislation. 6 *OMCB Opinions* 192. We take this occasion to correct any such reading of that opinion and to reaffirm the limits we have placed on the scope of discussions under the exceptions. We interpret the language of the Act in light of its purposes and in such a way as to harmonize its various parts. *Cf. Lockshin v. Semsker,* 412 Md. 257, 275-76, 987 A.2d 18 (2010).

We begin with the principle that the Court of Appeals has stated variously as part of the "touchstone" or "heart" of the Act: "It is...the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business." *New Carrollton, supra*, 287 Md. at 71-72; *see also J. P. Delphey Limited Partnership v. Mayor and City of Frederick*, 396 Md. 180, 200, 913 A.2d 28 (2006) (quoting *New Carrollton*). The Court further reiterated in *Delphey* its adoption of the proposition that "one purpose of the government in the Open Meetings Act was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." *Id.* at 201 (brackets,

emphasis, and citations omitted). And, as we have stated, "The legislative process includes "the imparting of information about a matter, albeit unaccompanied by any discussion among the members of a public body...." 1 *OMCB Opinions* 35, 36 (1993).

As the Court explained in *Delphey*, however, the Act contains exceptions. So, we look also to the purpose of this exception, which we must construe strictly and in favor of open meetings. §10-508 (c). In 1 *OMCB Opinions* at 29, we referred to the Legislature's "understanding that some businesses might be deterred from making proposals about relocation, expansion, or retention of an existing facility if all such discussions were open to public view." In 2 *OMCB Opinions* at 82, we stated that the exception would apply "[I]f the overall discussion concerned a business' possible relocation to a site in Hyattsville under circumstances in which the business insisted on the need for confidentiality." We have thus interpreted the exception to address the business's interest in protecting its own identity and information.[6] We have also extended the exception to matters that could not have been "practically separated and discussed outside of the context of the specific business proposal," 6 *OMCB Opinions* at 194, and to the applicability of an existing law in a discussion "tied to" the proposal.

Here, the formulation of the County's policy on permissible uses in the 1,100-acre Industrial District did not fall into the category of confidential information belonging to Fairweather. Even if such legislation could be deemed to embody private information (a proposition we doubt), we note that Fairweather itself did not appear to seek secrecy concerning its interest in relocating to the County: the minutes of the closed sessions identified Mr. Fairweather and his lawyer as participants, and Mr. Fairweather announced his business's intentions at the July 1 Planning Commission meeting. Further, the policy could be discussed outside the context of Fairweather's proposal; the Task Force summaries report a discussion of the very same legislative topic without any mention of Fairweather. And, these meetings involved not the application of an existing law to a specific proposal, but rather the passage of a new law by the deadline and in the form required by the business making the proposal. We therefore conclude that the extension of the business location exception to the Commissioners' closed-session discussions on generally-applicable land-use legislation would not further the purposes of either the Act or the exception.

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[6] Maryland's other open government law, the Public Information Act, also affords businesses protection against a public entity's disclosure of their commercial information. *See* SG §10-617(d).

Our conclusion with respect to the limits of the business location exception is consistent with our application of the other exceptions in SG §10-508(a). We have not interpreted the other exceptions to extend to discussions regarding the public body's own generally-applicable policy decisions. For instance, in interpreting the "personnel matters" exception, we have concluded that while the exception permits closed sessions to discuss individual employees, it does not permit discussion of issues applicable to a class of employees. *See, e.g.* 3 *OMCB Opinions* 335,337 (2003). That exception, too, is intended to protect the information of the person discussed, not that of the public entity.

As indicated in Part I, above, we have applied a similar distinction with respect to the legal advice exception. *See* 1 *OMCB Opinions, supra,* at 149 (stating that the exception "may not be used as a mask for policy deliberations"). That exception protects the content of the advice; once it has been "sought and provided, the public body must return to open session to discuss the policy implications of the advice it received, or anything else about proposed legislation." *Id.* There, we concluded that a city council exceeded the "legal advice" exception when it discussed the need to have an ordinance drafted, "however brief and devoid of substantive discussion." *Id.* We explained:

> A decision by the Council that the City Attorney was to draft an ordinance amounted to a preliminary decision that the perceived problem required a legislative response. This decision was a key component of the legislative process at work here, and the absence of a debate preceding the decision is not proof against an Open Meetings Act violation. The press and public would have found this decision to have been of keen interest. It was required to have been made in open session....

Id. at 149-50.

We shall therefore draw the line for the "business relocation" exception in the same place we have drawn it for other exceptions and consistently with the principles set forth by the Court of Appeals: when a discussion strays beyond the specific proposal and into even the preliminary stages of a

"legislative response," the public body must conduct that discussion in an open meeting.[7]

Here, the Commissioners decided in closed session that a text amendment was needed, agreed to a date by which they would introduce it, decided that Fairweather's proposed use should be as of right, rather than by special exception, and signed a contract contingent on the implementation of these policy decisions, all before they held a public hearing on the text amendment itself. The fact that they did so without deliberating out loud is of no moment: the public was entitled to observe "every step" of this legislative process. *Cf. Delphey, supra,* 396 Md. at 200. We repeat what we said in 1 *OMCB Opinions* 35, 36 : "No part of this process, including the imparting of information to the [public body] about the ordinance and the procedures for its enactment, could be permissibly carried out in a closed session unless one of the specific exceptions in the Act were applicable."

C. *Summary*

We conclude that the Commissioners' closed-session deliberations on the text amendment and approval of the contract violated the Act, as did their failure to disclose those discussions in their closed-meeting summaries.

III.

The "Firefly" Issue

A. Facts and contentions

Complainant alleges that the Commissioners violated the Act by closing meetings on the basis of "boilerplate," by failing to identify the participants in the meetings, and, in those meetings, by negotiating contracts and discussing legislation to delete an obsolete reference in the County Code. The Commissioners' documents show that, like the Fairweather meetings, the

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[7] Although the act of approving a contract is a quasi-legislative function under §10-502(j)(3), not all contracts embody a new policy decision that would exceed the scope of an exception. In *Delphey,* the Court of Appeals applied the exception for the public body's "acquisition of real property" under SG §10-508 (a)(3). There, the City aldermen publicly adopted task force recommendations that they condemn or otherwise acquire certain land for a parking lot, publicly arranged the financing, and eventually, in closed session, voted to condemn that land. The Court, after finding that no ordinance was required for the condemnation, found that the aldermen had not evaded the Act's requirements and that the condemnation fell within the "acquisition of real property" exception. 396 Md. at 201-202.

meetings in question were closed to discuss a business's proposal to locate in the County. The proposal was code-named "Project Firefly."

We derive the facts from the Commissioners' closed minutes and therefore describe them only generally. On November 16 and 30 and December 14, 2010, the Commissioners went into closed session to discuss "the proposal for a business or industrial organization to locate, expand, or remain in the State...." The company is not identified in the minutes other than as "a private manufacturing company" which "considers its proposal as proprietary and requests confidentiality." The company proposing the relocation had evidently insisted on complete secrecy: not even the closed minutes identify the company's representatives, industry, or current location. The Commissioners primarily discussed assembling a package of incentives, including exemptions from certain taxes. In one meeting, the County Attorney raised certain legal issues, and the possibility of amending the County Code was raised. In the last meeting, the Commissioners discussed introducing an amendment to the Code of Public Local Laws on the next legislative day.

B. ***Discussion***

We conclude that the Commissioners did not exceed the scope of the business location exception by closing sessions to discuss and assemble financial incentives responsive to the company's requests. Here, as in 6 *OMCB Opinions* 192, *supra,* those appear to be "matters that the Commissioners would be expected to address in evaluating a business proposal" and that could not have been "practically separated and discussed outside of the context of the specific business proposal. *Id*. at 194. We also are not troubled by the failure to identify this company by name, for the reasons we stated in 1 *OMCB Opinions* 60 (1999).

The closed-minute references to amending the ordinance and to the timing of such an amendment are another matter. Those discussions appear to have crossed the line between information specific to a company or proposal, which may be discussed in a closed session, and policy deliberations, which may not. For the reasons we stated in our discussion of Issue I, the Act required the Commissioners to terminate any such discussions in their closed sessions and conduct them in public.

IV

The reconvened closed session issue

A. Facts and contentions

Complainant alleges that the Commissioners violated the Act by meeting in two closed sessions on May 25, 2010 without following the Act's closing procedures for the second session. The Commissioners have provided us with the relevant documents.

The minutes of the open meeting held that day show that the Commissioners convened in a meeting open to the public and voted at 8:37 a.m. to go into closed session. At 9:10 a.m., the Commissioners "temporarily adjourned to reconvene later in the morning" to discuss business location matters. At 10:31 a.m., the Commissioners voted to go into closed session to discuss personnel matters. At 10:46 a.m., they adjourned that closed session. Then, at 10:47 a.m., the "closed session [on business location] reconvened," and that second session was adjourned at 11:30 a.m. The minutes report that no action was taken in the personnel session and that certain actions were taken in the business location session. In their response, the Commissioners add that the Commissioners announced during the public session that the business location meeting would be reconvened later that morning. The Commissioners also state their belief that their disclosures complied with the Act.

B. Discussion

These facts present this question: must a public body vote to re-close a public meeting when the closed session merely continues a session that was properly closed earlier at the same meeting ?

The Act requires a public body that wishes to meet in a closed session to "conduct its vote to close the meeting and issue the required written statement [of the reason for closing the meeting] in open session." 1 *OMCB Opinions* 201, 204 (1997) (summarizing SG §10-508(d)(2)). Further, if a person objects to the closing, the public body must send a copy of the written statement to us. SG §10-508(d)(3). The purpose of these procedures is to ensure that the members of a public body are accountable to the public for their decisions to hold closed sessions. A "part of their accountability is to make that decision before the public that is about to be excluded." 1 *OMCB Opinions* 191, 193 (1996). Although we have found that a public body may prepare its closing statement in advance as long as the statement remains accurate, *see* 6 *OMCB Opinions* 77, 82 (2009), "[we] have long held that the vote to close a session

must occur at the meeting being closed, not at a prior meeting." 6 *OMCB Opinions* at 81-82. Thus, in 5 *OMCB Opinions* 184 (2007), we rejected the argument that a closed meeting which began one day and was reconvened five days later constituted a single meeting for purposes of the Act, and we found violations with respect to each closed session. *Id.* at 186-88. Similarly, in 3 *OMCB Opinions* 4,6 (2000), we concluded that "the Act would not have permitted [the public body] to vote on March 1 to close a meeting to be held on March 8."

Under these principles, the question boils down to whether the open Commissioners' vote to close the meeting occurred at a "prior meeting," in which case the Commissioners would have had to vote again, or, instead, at the same meeting. In 6 *OMCB Opinions* 77*,* we referred in passing to a closed session that occurred at two times during a single day as a single session and noted that the public body considered the sessions to be "part of a single business meeting that day." *Id*. at 81 and 81, n.2. And, in 6 *OMCB Opinions* 127, 131 (2009), we found no violation where, "if the closed session did not begin immediately, it did start shortly after the vote." There, addressing allegations by this Complainant about this same public body, we found no violation where the Commissioners voted at 9:55 a.m. on a series of motions to consider issues in closed session and completed its closed session by 10:45 a.m. We found no lack of accountability, no prejudice to the public's right to object, and no violation of the Act.

On these facts, we conclude that the "meeting being closed," *see* 6 *OMCB Opinions* at 81, n.2., was the single business meeting that the Commissioners had scheduled for May 25. We again find no lack of accountability, no prejudice to the public's right to object, and no violation of the Act.

V

Conclusion

We conclude that the Commissioners strayed beyond the scope of the exceptions they claimed when, in closed sessions, they discussed, decided to introduce, and, in the Fairweather matter, contractually bound the County to introduce, legislation. It follows from that conclusion that the Commissioners should have disclosed those topics in publicly-available minutes.

We find that the Commissioners did not violate the Act by holding two closed sessions, only hours apart and during one regularly-scheduled open meeting, on the basis of one closing statement and vote.

Finally, we commend the Commissioners for their forthright and thoroughly-documented response to this complaint.

OPEN MEETINGS COMPLIANCE BOARD

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